U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 08 September 2004

BALCA Case No.: 2003-INA-248
ETA Case No.: P2001-CA-09511409/LA

In the Matter of:

FARM FRESH RANCH MARKET,
Employer,

on behalf of

SAIF KADRI,
Alien.

Certifying Officer: Martin Rios
San Francisco, California

Appearances: Ali R. Mirhosseini, Esquire
Santa Ana, California
For the Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. Farm Fresh Ranch Market ("the Employer") filed an application for labor certification[1] on behalf of Said Kadri ("the Alien") on February 20, 2001. (AF 13).[2] The Employer seeks to employ the Alien as a supervisor (food market). This decision is based on the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the Appeal File. 20 C.F.R. § 656.27(c).

[1] Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

[2] In this decision, AF is an abbreviation for Appeal File.

STATEMENT OF THE CASE

In the application, the Employer described the duties of the position as overseeing and coordinating workers engaged in purchasing and stocking of fresh fruit, vegetables, meat, and fish, as well as ensuring freshness, inspecting products, and instructing employees. The Employer required no education but required two years of experience in the job offered. (AF 13).

In the Notice of Findings ("NOF"), issued November 27, 2002, the CO found that the Employer did not provide lawful, job-related reasons for rejecting four U.S. applicants at the time of their initial consideration. Identical letters from the Employer dated June 25, 2001 were sent to four U.S. applicants whose resumes showed that they were qualified. The CO stated that the Employer's letters had a discouraging effect and may have deterred them from responding to the Employer. In the letter, the Employer stated that it was a small market and "would not be able to meet with your career objective, particularly in the area of advancement." The Employer further stated that if the applicant wanted to meet for an interview, he should call the Employer as soon as possible. The Employer noted that if he did not hear from the applicant in "the next day or so, I can only assume you have no further interest in this position." (AF 25, 33, 35, 39). The CO found this letter discouraging and determined that the four U.S. applicants were rejected for other than lawful, job-related reasons in violation of 20 C.F.R. § 656.21(b)(6). The CO stated that the Employer should submit rebuttal which documented how each U.S. worker had been rejected solely for lawful, job-related reasons at the time of their initial consideration.

In rebuttal, dated March 12, 2003, the Employer stated that the intent of the June 25, 2001 letter was not to discourage or to reject the resumes of the U.S. applicants. The Employer agreed that the four U.S. applicants were qualified and the Employer stated that based on their resumes, it appeared that they were overqualified and the salary being offered would not meet their expectations. The Employer noted that the June 25, 2001 letter also asked the applicants to call the Employer immediately if they were interested

in the job opportunity and the Employer stated that none of the four U.S. applicants had contacted the Employer. (AF 5-8).

The CO issued the Final Determination ("FD") on May 14, 2003, denying the Employer's application for labor certification. (AF 3-4). The CO found that the Employer's rebuttal did not provide lawful, job-related reasons for rejecting the U.S. applicants at the time of their initial consideration because the rejection was not based on their qualifications, but on a premise that they were looking for a position that could provide future advancement or a higher salary that the Employer was offering. The CO concluded that the Employer had not satisfactorily rebutted the NOF and labor certification was denied.

On May 14, 2003, the Employer filed a Request for Review and the case was docketed in this Office on July 29, 2003. (AF 1). In a statement of position dated August 29, 2003, the Employer reiterated its earlier argument that the intent of the Employer was not to discourage any applicants or to reject resumes that had been submitted. The Employer again argued that review of the resumes indicated that the position did not meet the applicants' career objectives and the salary being offered did not meet their expectations. The Employer argued that all questions raised in the NOF had been responded to and the Employer had met all requirements to take into consideration U.S. workers.

DISCUSSION

The NOF directed the Employer to provide lawful, job-related reasons for rejecting four U.S. workers. The Employer agreed that the four U.S. workers were qualified. The Employer also stated that the June 25, 2001 letters were not written with the intent to discourage U.S. applicants, but reflected the information on the resumes of the U.S. applicants, indicating that they were over-qualified for the job.

An employer must take steps to ensure that it has obtained lawful, job-related reasons for rejecting U.S. applicants, and not stop short of fully investigating an applicant's qualifications. An employer who by its actions has made it sufficiently difficult for the applicants to obtain an interview so as to discourage them from pursuing the job opportunity has not shown a good faith effort to recruit U.S. workers and has not established lawful, job-related reasons for rejecting U.S. workers. *Budget Iron Works*, 1988-INA-393 (Mar. 21, 1989) (*en banc*).

By sending the June 25, 2001 letter, the Employer did not fully investigate the qualified U.S. applicants, but rather made assumptions about them based only a review of their resumes. Although the Employer stated in the letter that interested applicants could contact him for an interview, this phrase does not mitigate the earlier discouraging comments or the Employer's failure to more fully investigate the qualified U.S. applicants by offering to schedule interviews without the discouraging introductory sentences.

Further, an employer may not assume that a U.S. applicant is not available for or is disinterested in the position offered because career goals listed on the applicant's resume do not match the job offered. *J.J. Appelbaum's Deli Co.*, 1990-INA-475 (Jan. 30, 1992). An employer's belief that the applicant would be unwilling to accept the salary constitutes an insufficient basis for rejecting the applicant. *Palacio Metal Works*, 1990-INA-396 (Mar. 27, 1991).

The Employer did not offer the position to any of the applicants; consequently, the Employer has not shown that the applicants would have rejected the salary offered. Instead, the Employer has only implied that the applicants would seek a higher salary than that offered. In light of the foregoing, the CO properly found that the Employer has not documented lawful, job-related reasons for rejecting the U.S. applicants because the Employer has not established that it put forth good faith efforts to recruit the four qualified U.S. applicants. Therefore, we find that the CO properly denied certification.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED.**

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.